M RADHA KRISHNAN *a*

v.

PENTADBIR TANAH DAERAH MANJUNG & ANOR

HIGH COURT MALAYA, IPOH *b*
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 21-21-99]
30 JULY 2001

LAND LAW: *Land Administrator - Appeal against order of Land Administrator extinguishing appellant's right of way - Whether order contrary to law - National Land Code, ss. 27, 390, 395(1) - Whether complied with* *c*

This was an appeal under s. 418 of the National Land Code ('the Code') by the appellant to set aside an order made by the 1st respondent extinguishing a right of way created in the appellant's favour over land belonging to the 2nd respondent. *d*

Held:

[1] The 1st respondent's act of holding a land enquiry on a matter completely different from that stated in the notice allegedly sent to the appellant and thereafter making an order cancelling or extinguishing the right of way over the land when no evidence was adduced at that enquiry over its inexpediency was not only highly irregular but wholly contrary to the provisions of ss. 27, 390 and 395(1)(d) of the Code and totally unfair to the appellant. Therefore, the 1st respondent's order was contrary to law and must be set aside. *e* *f*

[Appeal allowed.]

Case(s) referred to:
Executive Aids Sdn Bhd v. Kuala Lumpur Finance Bhd [1991] 3 CLJ 1766; [1991] 2 CLJ (Rep) 593 ***(refd)*** *g*
Tong Tiong Lim v. Pentadbir Tanah Daerah, Johore Bahru & Anor [1994] 3 MLJ 674 ***(dist)***

Legislation referred to:
National Land Code, ss. 24, 27(b), 31(a), 34(1)(ii), (3), 390(2), 391(3), 392(a), 395(1)(b), (d), (2), 418 *h*

For the appellant - Mr Atithan; M/s Thevin Chandran & Wong
For the 1st respondent - Mohamed Jazamuddin Hj Ahmad Nawawi SFC
For the 2nd respondent - NP Ramachandran; M/s NP Ramachandran & Assocs

Reported by Suresh Nathan *i*

JUDGMENT

Clement Skinner J:

This is an appeal under s. 418 of the National Land Code (hereafter 'the Code'). It is brought by M. Radha Krishnan (hereinafter 'the appellant') to set aside an order made by the Pentadbir Tanah Daerah Manjung (hereafter 'the 1st respondent') on 1 February 1999, extinguishing a right of way created in his favour over land belonging to one Vadivelu Palanisamy (hereafter 'the 2nd respondent') and held under title G.T. 9016, Lot 3332, Mukim Sitiawan, Daerah Manjung (hereinafter 'Lot 3332').

The appellant also seeks the following orders:

(i) A declaration that he is entitled to the right of way on the land held under G.T. 9016, Lot 3332, Mukim Sitiawan, Daerah Manjung.

(ii) A declaration that the order of the 1st respondent dated 15 February 1999 extinguishing the right of way on the land held under G.T. 9016, Lot 3332, Mukim Sitiawan Daerah Manjung is wrong and null and void.

(iii) A declaration that the right of way created over Lots 6121, 6122 and 5865 for land held under title No. E 5394, E 5395 and E 4497 and all other orders with respect to the said right of way by the 1st respondent are null and void.

(iv) An order that the right of way on the land held under G.T. 9016, Lot 3332, Mukim Sitiawan Daerah Manjung and endorsed on the registered document of title on 14 November 1997 be maintained.

(v) An order that the registered proprietor of land held under G.T. 9016, Lot 3332, Mukim Sitiawan Daerah Manjung, the 2nd respondent, maintain the right of way created on the said Lot 3332.

(vii) An order that the 2nd respondent be and is hereby restrained by an injunction from in any way preventing, restricting the appellant from using the right of way on Lot No. 3332 Mukim Sitiawan.

(viii) That the costs of and incidental to this application may be paid by the respondents.

The facts giving rise to this appeal are these. The appellant is the owner of a parcel of land held under title G.T. 3182 Lot 2420 Mukim of Sitiawan, District of Manjung (hereafter 'Lot 2420'). It lies adjacent to Lot 3332 which is owned by the 2nd respondent. It is planted up with palm oil trees. On or about 6 June 1990, the appellant applied to the Land Administrator, Daerah Manjung for a right of way over Lot 3332. The right of way was applied for under

s. 390 of the Code. The purpose of the right of way applied for was to enable the appellant to transport his palm oil fruits out of Lot 2420.

After a land enquiry held on 21 July 1992 and 27 April 1993 for that purpose, the Land Administrator, Daerah Manjung ordered that a right of way be created over Lot 3332 in favour of the appellant. The notes of proceedings of that land enquiry show that the 2nd respondent was present and was also represented by a lawyer.

Being dissatisfied with the decision of the Land Administrator in creating the right of way over his Lot 3332, the 2nd respondent appealed against that decision to the High Court at Ipoh, *vide* Notice of Motion No. 25-34-93. Upon the hearing of that appeal, the learned judge on 21 April 1995 dismissed it. The learned judge handed down a fully reasoned decision for doing so. That judgment as well as the notes of proceedings in that appeal have been exhibited to the notice of motion herein.

It is important to mention here the stand taken by the 2nd respondent in the appeal before the learned judge of the High Court, Ipoh. It was strongly argued on his behalf that the Land Administrator had erred in granting the right of way over Lot 3332 as he had failed to take into account two alternative accesses leading to Lot 2420 by reason whereof, the application for a right of way was really to suit the convenience only of the appellant as owner of Lot 2420. After reviewing the evidence presented at the land enquiry, the learned judge concluded.

> On the submission that the Land Administrator during his enquiry had failed to take into consideration the existence of the two access roads, I can only say that his notes of enquiry show otherwise. He had personally visited the area on 21.7.92 and found as a fact that, in his own words "tiada laluan yang dapat digunakan untuk membawa kenderaan ke tanah Lot 2420". I find that the Land Administrator here had meticulously investigated into the merit of this application and had satisfied himself, on an objective basis, that there was a case for the creation of this right of way. I can only conclude that the Land Administrator had properly evaluated the facts as he found them before exercising his discretion.

The 2nd respondent being dissatisfied with the decision of the learned judge of the High Court, Ipoh, preferred an appeal to the Court of Appeal but that appeal was dismissed on 30 July 1996. It matters not whether the 2nd respondent's appeal was dismissed by the Court of Appeal because his memorandum of appeal was not filed in time: the fact remains that the decision of the High Court, Ipoh confirming the decision of the Land Administrator in granting the right of way over Lot 3332 stands and that decision decides that the right of way over Lot 3332 had been correctly and properly granted.

Going back a little in time, while the 2nd respondent's appeal process was taking its course, the Pejabat Daerah dan Tanah Manjung instructed the appellant by its letter of 9 June 1995 to pay RM2,200 as compensation to the 2nd respondent for the crops affected by the right of way which the appellant duly did on 18 March 1997. The appellant also paid RM1,000 on 22 July 1994 as survey fees and RM20 on 29 July 1994 for the boundary stones in respect of the said right of way.

Within three months of the 2nd respondent's appeal to the Court of Appeal being dismissed, the Registrar of Titles, Perak caused to be indorsed on the registered title to Lot 3332 a memorial of the grant of the right of way under s. 391(3) of the Code. The proper survey plans of the right of way as well as the full details thereof including its boundary stones are also shown on the plans to Lot 3332.

Some two and a half years after the 2nd respondent's appeal had been dismissed by the Court of Appeal, the appellant received a notice from the 1st respondent dated 9 February 1999, informing him that an enquiry would be held at the Land Office, Manjung on 15 February 1999. That notice which was in Form 2A indicates that it was issued pursuant to s. 27 of the Code and states that the enquiry was in respect of:

> Permohonan hak lalu lalang atas Lot 3332 Mukim Sitiawan (GT.90l6).

The appellant was surprised to receive this notice from the 1st respondent because he had not made any fresh application for a right of way over Lot 3332. He accordingly wrote back to the 1st respondent on 12 February 1999 informing him that he (the appellant) had not made any other application for a right of way over Lot 3332 other than that made in 1990 which had already been granted and which the High Court at Ipoh had confirmed on 21 April 1995, and an appeal against that decision had been dismissed by the Court of Appeal on 30 July 1996. The appellant also informed the 1st respondent that he had been using the right of way without problems and therefore could not understand the need for another enquiry into a right of way which had been settled some eight years earlier. The appellant ended his letter by saying he would refer the matter to the "higher authorities". He did not attend the land enquiry fixed for 15 February 1999.

Shortly thereafter, the appellant received a letter from the 1st respondent dated 2 March 1999 informing him that the right of way over Lot 3332 had been cancelled. The reason given by the 1st respondent in his letter for the cancellation was that there was a new right of way over Lots 6121, 6122 and 5865, Mukim of Sitiawan.

What was not known by the appellant at that time, but which is now revealed by the documents exhibited in court, is that within one year of his appeal being dismissed by the Court of Appeal, the 2nd respondent, through his present solicitors, wrote a letter dated 22 July 1997 to the Penasihat Undang-Undang, Ipoh, copied to the District Officer of Manjung, drawing attention to s. 395 and s. 34 of the Code and urging that they be acted on. Section 395 authorises the Land Administrator, if he is of the opinion that "it is inexpedient that a Land Administrator's right of way should continue to exist" to extinguish it. Section 34 of the Code allows, in the limited circumstances mentioned in that section, a re-opening of any inquiry held under the Code.

So apparently what the 2nd respondent had failed to achieve through the appellate process he now sought to achieve through his solicitors' letter of 22 July 1997, and, it would appear he did because within six months of that letter being written, the 1st respondent held a land enquiry on 10 December 1997 at which the 2nd respondent and another were present but the appellant was not. At that land enquiry several important orders were made. In fact six orders were made. They were:

(i) that the right of way granted over lot 3332 be extinguished pursuant to s. 395(1);

(ii) that a new right of way be created over Lot 6121, Lot 6122 and Lot 5865;

(iii) that the route traversed by the new right of way be from Lot 2420 to the road reserve through Lots 6121, 6122 and 5865;

(iv) that the owner of Lot 2420 be permitted to use vehicles;

(v) that the survey fees is to be paid by the applicant;

(vi) that the owner of Lot 2420 (i.e. the appellant) is to construct and maintain this private right of way.

The appellant denies any knowledge of the land enquiry held on 10 December 1997 or of being informed of the decision arrived thereat but the 1st respondent alleges that a notice of such enquiry was sent to the appellant. I will address this issue shortly.

In bringing this appeal, the appellant contends that the decision made by the 1st respondent at the land enquiry held on 15 February 1999 is unfair, unjust and plainly wrong. He also complains that the new right of way created over Lots 6121, 6122 and 5865 is not suitable for transporting his palm oil fruits as it connects to his land in an area which is swampy and where the adjoining lands are situated on different elevations.

Mr Atithan of counsel for the appellant has attacked the cancellation of the appellant's right of way over Lot 3332 on several grounds. He says that:

(i) When the 1st respondent held the enquiry on 10 December 1997 that amounted to a re-opening of the first land enquiry held in 1993 when the right of way was first granted. However, according to Mr. Atithan, under s. 34(1)(ii) of the Code, the 1st respondent is prohibited from re-opening that enquiry because more than three years had elapsed since the making of that decision.

(ii) He next said that the enquiry held on 10 December 1997 was in contravention of s. 390 of the Code. By that section, the State Authority or the proprietor or occupier of any alienated country land may apply to the Land Administrator in Form 28A for the creation of a private right of way, whereafter the Land Administrator shall either hold an enquiry or make such investigations as he thinks appropriate. According to Mr. Atithan, no such application as mentioned in s. 390 had been made to the Land Administrator and therefore the enquiry held by him on 10 December 1997 was clearly in contravention of s. 390 of the Code.

(iii) He also complained that the appellant was not given notice of the enquiry held on 10 December 1997 contrary to the provisions of s. 27(b) of the Code which requires that every person interested in the enquiry shall be served with notice of it. This omission on the part of the 1st respondent had deprived the appellant of his right to be heard at the enquiry which had occasioned a breach of the rules of natural justice. To compound matters, the 1st respondent did not inform the appellant of any decision arrived thereat.

(iv) He next submitted that the order made by the 1st respondent at the land enquiry purportedly held on 15 February 1999, cancelling the right of way over Lot 3332 must be set aside because:

(a) the notice of such enquiry sent to the appellant was not a proper notice. It did not comply with s. 27 of the Code, in that, the appellant was never informed that the enquiry was being held with a view to cancel or extinguish his right of way over Lot 3332;

(b) there was in fact no enquiry held on 15 February 1999 as alleged because a perusal of the notes of proceedings of the enquiry allegedly held shows that no one attended that enquiry: only a decision was made;

(c) the decision itself was flawed because it relied upon the fact that a new right of way had been created over Lots 6121, 6122 and 5865. But according to Mr. Atithan, the new right of way was created at the land enquiry held on 10 December 1997 which enquiry itself is invalid.

In answer to the challenges mounted against the decision of the 1st respondent made at the land enquiries held on 10 December 1997 and 15 February 1999 respectively, Encik Jazamuddin, learned Senior Federal Counsel who appeared for the 1st respondent contended that in so far as the enquiry held on 10 December 1997 was concerned, it was not a re-opening of the enquiry held in 1993. It was held because the 1st respondent was going to hold an enquiry for the creation of a new right of way under s. 390(2) of the Code. He also submitted that when such an enquiry is held, the notice sent out to persons who are interested in the enquiry need not state with any precision the subject-matter of the enquiry – it is sufficient if the notice informs that person that an enquiry will be held on a certain date and anybody who wishes to make a claim or objection or other request may do so at the enquiry. According to the learned Senior Federal Counsel, the appellant had been duly informed of the enquiry to be held on 10 December 1997 as he was sent a notice of the same by A.R. registered post which he acknowledged. Having been served with such notice, if the appellant refused to attend he cannot complain of not being given an opportunity of being heard.

Learned Senior Federal Counsel went on to say that even if the land enquiry of 10 December 1997 was not properly held, the enquiry on 15 February 1999 was. According to him, s. 395(1)(b) of the Code authorises the 1st respondent to hold an enquiry and thereafter order that a right of way be extinguished if he is of the opinion that it is inexpedient that it should continue to exist. According to learned Senior Federal Counsel, this is exactly what the 1st respondent did. And, for the 1st respondent to exercise his powers under s. 395(1)(b) there need not be any application made to him to do so. He can act on his own volition and this he did when he sent to the appellant a notice of the enquiry to be held on 15 February 1999, which the appellant does not dispute receiving. According to learned Senior Federal Counsel, the appellant never objected to that enquiry nor did he ask for a postponement thereof. He simply chose not to attend. Since the enquiry was properly held, and the 1st respondent had given his reasons for the same, it was the submission of learned Senior Federal Counsel that the order made on 15 February 1999 was proper.

So, was the order of the 1st respondent made on 15 February 1999 extinguishing the right of way created over Lot 3332 and notified to the appellant on 2 March 1999 properly and lawfully made? For the reasons hereafter appearing, I regret that it was not.

In the first place, the notes of proceedings of the enquiry held on 15 February 1999 reveal that it was expressly held to enquire into the extinguishment of the right of way over Lot 3332 under s. 395(1)(b) of the Code. The fact that the 1st respondent had decided to hold an enquiry for that purpose brings into operation the provisions in Chapter 4 of the Code relating to the holding of enquiries. In particular, s. 27 is relevant. It provides that:

> Before holding any enquiry, the Land Administrator shall:
>
> (a) publish, in such manner as he may consider appropriate in the circumstances of the case, a notice thereof in Form 2A; and
>
> (b) serve on every person or body who is to his knowledge interested **in the subject-matter thereof** a copy of that notice, to which shall be appended the additional notice set out in the supplement to that Form. (Emphasis added).

Two things may be said about s. 27. The first is that the Form 2A notice must be served on every person having an interest in the subject-matter of the enquiry and secondly, to serve its intended purpose, it must also inform the person so served of the subject-matter of the enquiry. The question is, did the 1st respondent comply with s. 27 before he held the enquiry on 15 February 1999? In the Form 2A sent to the appellant, it is stated that the land enquiry was for the purpose of "permohonan hak lalu lalang atas Lot 3332 Mukim Sitiawan (GT. 9016)." The Form 2A, therefore, never informed the appellant that an enquiry was being held to extinguish his right of way over Lot 3332. The omission to state the true purpose of the enquiry in Form 2A was, in my opinion, fatal to the holding of the enquiry because without having done so, it cannot be said that procedural fairness had been accorded to the appellant. By the omission the 1st respondent in effect deprived the appellant of an opportunity of knowing what was truly to be enquired into and decided upon so that he could make an informed decision whether or not he would avail himself of the opportunity to be heard thereon. And this is what had in fact happened in this case because the appellant, on receiving the Form 2A notice, did write back protesting at the need for another enquiry when his application for a right of way had been granted eight years earlier. It is quite obvious that the appellant had no idea whatsoever that the enquiry was being held to extinguish his right of way. In the circumstances, I find that the 1st respondent had acted in breach of s. 27 of the Code when he failed to serve the appellant with a proper notice of the enquiry as required by the section. The appellant's failure to attend the enquiry did not have the effect of excusing the failure of the 1st respondent to comply with the statutory requirements of s. 27 of the Code because he had never been informed of its true purpose. It follows from what I have said that I do not agree with the submission of learned Senior Federal Counsel that a Form 2A notice need not

be precise. While I myself would not use the word precise, I would say that to comply with s. 27 of the Code, the Form 2A notice should inform the person to whom it is addressed of the true nature and purpose of the enquiry.

In the second place, a perusal of the notes of evidence of the enquiry held on 15 February 1999 shows that in fact no enquiry was held. The record reads: "Yang hadir: Tiada". There is no record of any evidence being recorded at the enquiry and the only matter recorded is a "Perintah" or the decision arrived at. Now, s. 31 of the Code provides that:

> In conducting any enquiry it shall not be necessary for the Land Administrator:
>
> (a) to take down the evidence of any witness verbatim, unless he thinks it desirable to do so, or is so requested by that witness or by any person appearing in the course of the enquiry:
>
> Provided that the Land Administrator shall record the substance of any evidence which is not taken down verbatim;
>
> (b) ...

Thus, while it may not be necessary for the 1st respondent in holding an enquiry to take down the evidence of a witness verbatim, he must nevertheless record the substance of any evidence which is not taken down verbatim. There is nothing in the section which says that no evidence is required to be given or recorded at an enquiry. On the contrary, the section clearly contemplates the recording of evidence: if the evidence is not recorded verbatim, then the substance of it must be, the word being "shall" record. With no evidence having been recorded at the enquiry, I find that the 1st respondent had again acted in contravention of s. 31(a) of the Code.

Learned Senior Federal counsel has submitted that the 1st respondent had done everything required under the Code and should therefore not be faulted. He had sent out the Form 2A notice to the appellant and even held an enquiry when there was no requirement to do so as s. 395(1) uses the word "may" hold an enquiry. With respect, that section only gives the 1st respondent a discretion whether or not to hold an enquiry. Once he decided to hold one, as in this case, he must comply with the statutory provisions of the Code. Learned Senior Federal Counsel referred me to the case of *Tong Tiong Lim v. Pentadbir Tanah Daerah, Johore Bahru & Anor* [1994] 3 MLJ 674. I regret that the facts of that case are clearly distinguishable from ours and what was decided there cannot assist the 1st respondent here. In that case a second land enquiry was held to re-open the first enquiry under the provisions of s. 395(1)(b) read with s. 34 of the Code. A second enquiry was actually held and witness evidence recorded and a decision arrived at and although the

second Assistant Land Administrator had failed to record briefly his reasons for re-opening the first enquiry, as required by s. 34(3), it was held that was not fatal to the proceedings as sub-s. (3) was only directory and not mandatory. But that is not what has happened in our case. Here, no enquiry was in fact conducted but a decision arrived at.

In the third place, bearing in mind that the ostensible purpose of the enquiry under s. 395(1)(b) was for the 1st respondent to satisfy himself that it was inexpedient that a right of way over Lot 3332 should continue to exist, if nobody turned up for the enquiry and if no evidence was given by anyone at the enquiry on 15 February 1999, on what basis was the decision arrived at that day? According to the 1st respondent, it was made based on a report prepared by an officer of the land office. That report is exhibited as MT1 of the 1st respondent's affidavit of 6 July 1999. I think it will be useful to refer to the decision made by the 1st respondent on 15 February 1999. It reads:

> Saya perintahkan hak lalulalang atas Lot 3332 (GT. 9016) Mukim Sitiawan dibatalkan sebab tuan tanah Lot 2420 Mukim Sitiawan iaitu pemohon Radhakrishnan A/L Murugasan boleh menggunakan hak lalulalang awam yang telah diwujudkan melalui Lot 6121, 5865 dan Lot 6122 Mukim Sitiawan dari rezab jalan ke tanah pemohon iaitu Lot 2420 Mukim Sitiawan.

Nowhere in that decision is any reference made to the report prepared by the officer of the land office and nowhere in the notes of proceedings is it recorded that that report was received in evidence. A perusal of that report shows that it was prepared on 4 August 1997, which is some two years before the enquiry of 15 February 1999 was held. I accordingly find it incredible that the 1st respondent would rely on a report made of a site visit some two years earlier by someone who has not given evidence at the enquiry as the basis of his decision. Evidence wise, it was also highly questionable that the 1st respondent would rely on a report prepared in 1997 as what was revealed by a site inspection conducted some two years earlier may not accurately reflect the position two years later. I therefore find that the 1st respondent cannot be said to have satisfied himself, within the meaning of s. 395(1)(b) of the Code, as to the inexpediency of the right of way over Lot 3332 continuing to exist, when he extinguished it on 15 February 1999; the very same right of way which the learned judge of the High Court, Ipoh described as having been granted by the previous Land Administrator after having personally visited the area and meticulously investigated into the merits of its creation.

In the fourth place, I am fortified in my view that the 1st respondent had not conducted any enquiry on 15 February 1999 to enquire into the inexpediency of the right of way over Lot 3332 continuing to exist because the decision to cancel or extinguish the right of way over Lot 3332 had already been made at the enquiry held some two years earlier on 10 December 1997. In the

circumstances, the sending of the Form 2A notice under s. 27 of the Code, requesting the appellant to attend an enquiry into a matter upon which a decision had already been taken some two years earlier was a worthless exercise, to say the least.

Another point worth making about the enquiry held on 15 February 1999 is this: the absence of the appellant is explained. But what about the other persons interested in the subject-matter of the enquiry? Bearing in mind that the Form 2A mentions Lot 3332 and so did the heading of the notes of proceedings; and, bearing in mind also that the decision arrived at mentions a further three lots, namely, Lots 6121, 6122 and 5865, surely the owners of these lots would need to be present to give evidence of the suitability or otherwise of the new right of way mentioned in the decision before it could be made? The fact that even they were absent only serves to show how irregular the enquiry on 15 February 1999 was. No attempt had been made to comply with the provisions of s. 31(a) of the Code.

In the fifth place, it is clear to me that the decision made at the enquiry held on 15 February 1999 was to give effect to the decision made at the enquiry held two years earlier on 10 December 1997 when the new right of way over Lots 6121, 5865 and Lot 6122 was created. However, that enquiry itself was in my judgment irregular and the decision arrived at invalid for the following reasons:

(i) The appellant complains that he was not aware of such an enquiry until its existence was revealed for the first time in the affidavit of the 2nd respondent filed on 13 May 1999. The appellant has since that revelation repeatedly denied that he received any notice of such enquiry. He also complains that he had not been notified of the decision made on 10 December 1997. Those assertions and denials were first made in the appellant's affidavit of 19 May 1999.

The 1st respondent filed an affidavit in these proceedings on 6 July 1999. I would have expected him to immediately answer or reply to the allegations made by the appellant but he did not. He did not even refer to the fact that he had held an enquiry on 10 December 1997. It was finally on 25 April 2000, after this appeal had commenced that the 1st respondent revealed that he had held an enquiry on 10 December 1997, notice of which was sent to four persons, namely, the 2nd respondent, one En. Maniam Kuppusamy, one Mr. Ting Poh Huat and the appellant. According to the 1st respondent, the Form 2A notice under s. 27 of the Code was sent to these four persons by A.R. registered post and they all received the notice. As evidence of such receipt the 1st respondent has exhibited the A.R. card allegedly acknowledged by the appellant.

The appellant denies having received the Form 2A notice sent to him. He says the signature appearing on that A.R. card (Exh. MT4A) is not his. When the A.R. cards in respect of the other three persons is looked at, they show that each contains the date on which the article sent by A.R. registered post was received and the postmaster also signed the card. However, in the case of the A.R. card allegedly signed by the appellant, the date on which the article was allegedly delivered was not stated and the postmaster also did not sign the card. I find it more probable than not that the appellant never received the Form 2A allegedly sent to him.

(ii) A perusal of the Form 2A notice itself shows that the appellant was informed that the enquiry on 10 December 1997 was for the purpose of "permohonan hak lalulalang oleh En. M. Radhakrishnan atas Lot 3332 Mukim Sitiawan." This cannot be further from the truth because we know that the appellant's application for a right of way had been heard and granted in 1993. The Form 2A notice allegedly sent to the appellant in respect of the enquiry of 10 December 1997, therefore, suffers from the same defects I had earlier spoken of when discussing the Form 2A notice sent to the appellant for the enquiry held on 15 February 1999 and everything I had said about that notice would apply with equal force here.

(iii) When the notes of proceedings of the enquiry held on 10 December 1997 is looked at, it shows that the enquiry was being held in respect of the creation of a 'right of way' under s. 390 of the Code and the extinction of a right of way under s. 395 of the Code and that the applicants are stated as being the 2nd respondent, one Maniam Kuppusamy and one Ting Poh Huat but not the appellant. This shows that what was stated in the Form 2A notice sent out for that enquiry was not only incorrect but in contravention of s. 27 of the Code. Mr. Atithan has also pointed out that under s. 390, the proprietor or occupier of alienated land may apply to the Land Administrator in Form 28A for a private right of way but that no such application was made to the 1st respondent in respect of the enquiry held on 10 December 1997. I agree with Mr. Atithan. Had there been applications in Form 28A made by the 2nd respondent, Maniam Kuppusamy and Ting Poh Huat, the Form 2A would have named them as applicants. In addition, the lands affected by the creation of the right of way was stated as Lots 6121, 6122 and 5865. There is no mention at all about Lot 3332 or Lot 2420. In so far as the evidence recorded at that enquiry is concerned, it shows that the only person who said anything was the lawyer acting for the "applicant" landowners. There was no record whatsoever that any evidence was led regarding the inexpediency of the right of way over Lot 3332 or even that the report of the land officer made on 8 August 1997 was introduced in evidence. Therefore, for the 1st respondent to have held a land enquiry on a matter completely different

from that stated in the Form 2A allegedly sent to the appellant and thereafter to make an order cancelling or extinguishing the right of way over Lot 3332 when no evidence was adduced at that enquiry is to its inexpediency is not only highly irregular but wholly contrary to the provisions of s. 27, s. 390 and s. 395(1)(d) of the Code and totally unfair to the person most affected by it.

Mr. Atithan has said the enquiry held on 10 December 1997 was a re-opening of the enquiry held in 1993. The 1st defendant has denied he was doing so. I do not think he did. His notes of proceedings clearly show that he was holding an enquiry to create a right of way as well as to extinguish a right of way but as I said, the procedure he has adopted in going about it has been so highly irregular and contrary to the relevant provisions of the Code that it has resulted in injustice to the appellant.

(iv) Another disturbing aspect of the enquiry held on 10 December 1997 and the orders made thereat is that the appellant was never informed of the decision arrived at. I have already said the 1st respondent never replied to this allegation even though it is made in the appellant's affidavit of 19 May 1999. Without being informed of the decision arrived at on 10 December 1997, the appellant was effectively denied the opportunity to challenge it. It must also be noted that whereas s. 395(2) of the Code requires that on the making of an order extinguishing a right of way, the memorial made on the creation of such right shall be cancelled, no such cancellation was effected after the order was made at the enquiry of 10 December 1997. A cancellation was only made some two years later, after the enquiry of 15 February 1999.

For all the reasons given above, I find that the enquiry held on 15 February 1999 and the order made on that day extinguishing the right of way over Lot 3332 was contrary to law and must be set aside.

Mr. Ramachandran, learned counsel for the 2nd respondent has said that I should overlook whatever irregularities that may have occurred at the enquiries held on 10 December 1997 and 15 February 1999 because s. 24 of the Code states that every enquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter 4. I regret that I do not regard the irregularities that I have already alluded to as minor irregularities arising as a result of minor departures from the provisions of Chapter 4. They are serious irregularities and have prejudiced and caused injustice to the appellant. Mr. Ramachandran has also referred to the case of *Executive Aids Sdn Bhd v. Kuala Lumpur Finance Bhd* [1991] 3 CLJ 1766 where the court found that the writing of a different date at the head of the notes of proceedings from that found at the end of the notes of proceedings for sale of land was an

administrative error which did not nullify the proceedings. Nothing of that nature has occurred here. The case therefore does not assist the respondents.

Before concluding, I wish to say that a lot of evidence was led by the 2nd respondent and the appellant about the suitability or otherwise of the new right of way created over Lots 6121, 6122 and 5865. However, in the light of the conclusions I have arrived at regarding the orders made on 10 December 1997 and 15 February 1999, it is not necessary for me to address these submissions. I have also not found it necessary to deal with this evidence and the competing contentions of the parties because it is clear to me from a reading of the notes of proceedings of the enquiries held on 10 December 1997 and 15 February 1999 that the 1st respondent never heard or considered any evidence on the question of the suitability of the new right of way over those lands before arriving at his decision. I do not think, therefore, that sitting in appeal, I should enter that arena.

In conclusion, I set aside the order made by the 1st respondent on 15 February 1999 extinguishing the right of way over Lot 3332. I also grant the appellant the orders sought in items (b), (c), (d) and (e) of his amended notice of motion. There will be no order in respect of item (f) as the law requires the appellant to maintain the same (see, s. 392(a) of the Code). As to item (g), the appellant is at liberty to apply for that relief if and when advised to do so.

In the result, I allow this appeal with costs.